No. 13,141

IN THE

United States Court of Appeals

For the Ninth Circuit

FIBREBOARD PRODUCTS, INC. (a corporation),

Appellant,

vs.

W. H. TOWNSEND,

Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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THE OPINION BELOW.

The District Court, sitting without a jury, wrote an opinion ordering judgment for the appellee, plaintiff below, in the sum of $2,530.25, with interest thereon at the rate of seven per cent per annum from the date thereof (29, 30).[1] The Court entered findings of fact and conclusions of law in support of its order for judgment and thereby entered judgment (31-36).

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[1]References to pages of the Transcript are shown by the page numbers in parentheses: ( ).

Exhibits are referred to by appropriate letter or number following the designation of plaintiff or defendant: (P.....) or (D.....).

Page of the record for an exhibit is shown by page number preceding the letter indicating whose exhibit is referred to, with the letter or number of the exhibit following: (.....P.....).

JURISDICTION.

Final judgment was entered in this case on September 20, 1951 (34, 35). The jurisdiction of the District Court was invoked pursuant to the provisions of Title 28, U.S.C. Sec. 1332, and by virtue of the facts that appellant Fibreboard Products, Inc. (defendant below) is a Delaware corporation and appellee (plaintiff below) is a citizen of the State of California and the amount in controversy exceeds $3,000, exclusive of interest and costs (First Amended Complaint, 7-12).

This Court has jurisdiction pursuant to the provisions of Title 28, U.S.C., Sec. 1291.

STATEMENT OF THE CASE.

I. NATURE OF CASE RAISED BY THE PLEADINGS.

Appellant in its opening brief has substantially stated the issues involved in the pleadings of the parties (Appellant's Opening Brief 2, 3).

II. QUESTIONS PRESENTED.

Appellant's statement of points on which it intends to rely is set forth at pages 231-234 of the record. They are nineteen in number, but appellant has summarized them to a total of nine (Appellant's Opening Brief 3, 4, 5) and has further reduced them to the following questions:

A. No contract existed due to uncertainty as to terms.

B. Liability of defendant was discharged by plaintiff's rejection of an offer of performance.

C. The alleged contract was unenforceable for lack of mutuality.

D. The alleged contract was unenforceable as it was terminable at the will of either party.

E. The alleged contract was not enforceable under the statute of frauds.

III. THE FACTS.

The Court sitting without a jury, after hearing all the evidence submitted, found as follows:

A. That on or about the 18th day of October, 1948, the plaintiff and the defendant Fibreboard Products, Inc., entered into an oral and written permanent contract of employment whereby the parties mutually agreed that plaintiff should be employed by defendant corporation in the capacity of a recovery operator in the Recovery Department of the San Joaquin Division of said defendant corporation's newly constructed paper pulp mill plant at Antioch, California, said employment to commence when defendant's paper mill plant began operations, and to continue for so long as plaintiff's work was satisfactory, and that plaintiff's permanent position would be at the prevailing hourly rate of $1.725 per hour, forty hours per week, fifty-two weeks per year. It was further agreed that plaintiff would remove from the City of Tuscaloosa, Alabama, to Antioch, California, and pending the opening of defendant's paper pulp mill,

said defendant would endeavor to find other employment for plaintiff.

B. That at the time of the agreement between the parties, defendant corporation was advertising for and in need of experienced paper pulp men, and was creating a labor pool of experienced pulp mill men in contemplation of the opening of the pulp mill plant in Antioch, California.

C. That plaintiff had had many years of experience in many phases of the paper pulp mill industry and was a seasoned and experienced recovery operator.

D. That plaintiff was gainfully employed in Tuscaloosa, Alabama, at the time of the agreement and that he did leave said employment and did remove with his family to Antioch, California, and that he did pay his own expenses for said move, and plaintiff did dispose of his furniture and personal belongings in order to remove to defendant's place of employment.

E. That on or about November 2, 1949, defendant corporation's paper pulp mill was ready for operation, at which time, plaintiff did present himself ready, willing, and able to perform his part of the contract of employment.

F. That when the employment for which plaintiff was contracted became available, defendant corporation refused, and does now refuse, to fulfill the terms of the said contract, and refused, and does now refuse, to employ the plaintiff.

G. That plaintiff has performed all of the things and matters on his part to be performed under the terms of the said contract and that defendant corporation has wholly failed to perform the things and matters on its part to be performed under the said contract of employment.

H. That a contract for permanent employment in the State of California is a contract to retain in employment for a reasonable period of time, and that a reasonable period of time is two years.

I. That had plaintiff entered into the employ of defendant corporation as contracted at the time plaintiff presented himself ready, willing, and able, to the said defendant corporation, he would have earned the sum of $7,176.00 during a two year period. If plaintiff continues in his present occupation, he will have earned $4,645.75, or sustained a loss of earnings for the two-year period in the sum of $2,530.25.

The facts, generally stated, are that plaintiff, who for a period of twenty years had worked in pulp mills, having been a tour foreman or general foreman for the North Carolina Pulp Company (72 P-5, 53) was working for the Otis Elevator Company in Tuscaloosa, Alabama, earning $1.58 per hour as a mechanic's helper when in August, 1948, he saw an advertisement in a trade journal offering employment to experienced pulp mill men (38, 190). He immediately answered it on August 26, 1948 (39 P-1) and enclosed a letter of reference received from the North Carolina Pulp Company (72 P-5).

On September 1, 1948, C. M. Stitt, plant manager of the defendant corporation's San Joaquin Division, answered plaintiff's letter of inquiry and application for employment, stating "based on your experience, we feel that you can be reasonably assured that we will have some position available for you", and that the matter would be referred to M. T. Lindley, who was expected to begin work as pulp mill superintendent for defendant corporation on or about October 1, 1948, and would be charged with the responsibility for hiring crews. An application blank and the letter of reference were returned to plaintiff (41, 42 P-2). Plaintiff filled out the application blank and on September 7, 1948, mailed it to defendant (90 D-A, 93 D-B).

In the afternoon of on or about the 18th day of October, 1948, plaintiff telephoned M. T. Lindley. According to the testimony of the plaintiff, Lindley told him that he had a permanent position for him when the pulp plant opened, that they were pleased with the prospect of hiring plaintiff, that if he wished to come sooner, he would be placed in a temporary position in one of the defendant's mills, and further, that the defendant would reimburse plaintiff any traveling expenses incurred by him and his family. Plaintiff told Lindley that he was employed by the Otis Elevator Company at $1.58 per hour, that he would give them notice but that he would be in Antioch, California, on the 15th day of November, 1948, with his family, ready to go to work (43, 98-99, 138-139).

Following his conversation with the plaintiff, Lindley on October 18, 1948, dictated a letter, which was dated October 19, 1948, wherein the plaintiff's telephone call was acknowledged and wherein Mr. Lindley said "* * *, if it is your desire to come to the Coast at an earlier date [before actual operations begin at the new mill], we will place you in one of our mills at whatever they may have for you until we begin operating". As for housing, Lindley said that rentals were critical but that there were "homes available for purchase ranging in price from $6,500 to $9,000 (45-46 P-3).

According to the plaintiff, upon receipt of Lindley's letter, he gave notice to the Otis Elevator Company (46) and sold five rooms of furniture of the approximate value of $2,500 for a sum of from $800 to $900 (49-51). On or about November 6, 1948, the plaintiff testified that he answered an ad in a newspaper placed by a party seeking someone who would drive an automobile to Fort Mason, California, in which he came to the Coast with his wife and three daughters, expending $209.35 for gas, oil, repairs, etc. on the trip (47-48).

Plaintiff arrived in Antioch on the 15th of November, 1948 and reported to Mr. Lindley. He was told that he would be given a position of recovery operator in the pulp mill when it commenced operations. About a week later he was given temporary work at the defendant's Antioch division, doing various jobs at $1.54 per hour, and for overtime and a half and double time (54-57).

Plaintiff testified that he waited thus for the pulp mill's opening and his inquiries to the management as to when he would be put to work as a recovery operator were constantly met with the promise that it was only a matter of time, until the plant began operations (59, 68-69).

From statements made by Stitt and Lindley, plaintiff learned that the pulp mill had begun operations and was about seventy per cent filled as to employment capacity, and plaintiff insisted that Lindley let him know when he would be put to work in the recovery room. On the 28th day of August, 1949, when this interview took place, Lindley told plaintiff that he was through. When pressed for reasons why, Lindley informed plaintiff that this decision was reached because the management had heard rumors (59-64).

Three days thereafter and on the 31st day of August, 1949, plaintiff was told to report at the San Joaquin Division at 1:00 p.m. Fuller, to whom plaintiff reported, explained that he had learned plaintiff was out of work and could give him a job in the paper mill as broke baler at $1.425 per hour. Plaintiff told Fuller that he was employed at the Antioch Division earning $1.54 per hour and further, that the work promised him at the San Joaquin Division was in the pulp mill and not in the paper mill. Fuller replied that he had not been fully apprised of those facts. Plaintiff thereupon returned to the Antioch Division (64-67). By a letter dated September 2, 1949 (57 P-4) plaintiff's employment with defendant corporation was terminated.

On September 3, 1949, a union representative and the plaintiff met with Mr. Stitt. It was Stitt's position, according to plaintiff, that Lindley had no authority to fire him but that the plaintiff had refused to accept employment offered by the defendant corporation's San Joaquin Division. Stitt refused plaintiff's request that Lindley and Fuller be brought in in order to clarify the situation but promised to look into it (69-70).

On November 2, 1949, plaintiff wrote to Stitt, stating that in September and October of 1948 he had been offered employment in the new pulp mill and requested that the promised employment be given him, or the reason for such denial (77-78 P-6). C. M. Stitt's reply to plaintiff's letter was that according to defendant's records, plaintiff had seen fit to turn down the position offered him at the San Joaquin Division on Wednesday, August 31, 1949 (79 P-7).

Plaintiff sought employment elsewhere and for a period of five months worked for the Southern Pacific Company. His earnings totaled $1,225.75, and incurred expenses of $25 per week because he had to live away from home, which said expenses totaled an additional $550. From other employment, plaintiff has earned $450 to date of trial. He is now employed as a filling station operator in Antioch, at $50 per week.

The rate of pay for a recovery operator in November, 1948, was $1.755 per hour, and, according to the evidence, is now $1.825 per hour (55-56).

ARGUMENT.

I. AS TO WHETHER NO CONTRACT EXISTED, DUE TO UNCERTAINTY AS TO TERMS.

Practically all the arguments and authorities raised by defendant were fully developed and advanced by defendant to the District Court below.

We do not argue with its contention that a contract must have a meeting of the minds in that in essential terms it must be certain and complete.

Our contention is, and the District Court so found, that this contract was not uncertain. Plaintiff was offered and accepted the position in the pulp mill. Pursuant to the telephone conversation of October 18, 1948, the date the Court found to be the date of the contract, Lindley, the superintendent, told plaintiff that he would be employed in the Recovery Department (138, 196). Certainly both parties understood that plaintiff would be employed in the pulp mill's recovery department; that is why Lindley marked plaintiff's application as he did (138, 139).

The length of time covered by the contract of employment was certain, for the Court found it to be permanent. The strongest evidence against defendant's contention was the testimony of Lindley and Stitt, adduced on cross-examination (131-167, 189-211).

There was no question as to which parties were obligated under this agreement. As to related conditions, e.g. vacations, holidays, overtime, shift premiums, call-in pay, promotions, seniority, etc., they were all matters which would be covered by the

collective bargaining agreement between defendant (employer) and plaintiff (employee), and the appropriate trade union, by which agreement all parties would abide. The evidence is clear that plaintiff had been a union organizer and a member of the craft union covering pulp mill workers, and also that defendant had a collective bargaining contract with the union (188, 193).

There was no aura of mystery surrounding the type of work the plaintiff was hired to do, because anyone familiar with the paper industry (and the parties here were familiar) knows the duties of a recovery operator. The defendant was creating a pool of experienced pulp mill men. From the material sent to defendant by plaintiff prior to the telephone conversation of October 18, 1948, defendant was well aware that plaintiff had had over twenty years' experience in recovery departments. The subject matters indicated in the letter from Stitt to plaintiff (41, 42 P-2) and from Lindley to plaintiff (45-46 P-3) set forth "pulp mill" and "recovery department" as the place where plaintiff would be employed.

The case of *Mason v. Rose*, 176 Fed. (2d) 486 should be read in conjunction with the opinion of Federal District Judge Knox (85 Fed. Supp. 300), which case was affirmed on appeal, for a thorough understanding thereof. The facts are that the plaintiff, who brought suit for declaratory relief under an alleged agreement was "getting pretty much of a raw deal" for a period of from two to three years as a result of the conduct of his employer or partner,

defendant Rose. During that period, neither party had made any contribution to performance of the alleged contract.

The facts of the above case should be distinguished from a case where one or the other of the contracting parties has performed, in whole or in part, the terms of the contract, and who had suffered financial loss or detriment. We believe the Court resorted to Fireside Equity to protect Actor Mason who was being harassed by defendant Rose, his employer.

The facts of the instant case are dissimilar. The plaintiff has already performed his part of the contract by quitting a job. (The fact that this job was temporary is irrelevant and not worthy of all the attention given it by the defendant. Plaintiff states that he could have continued with the firm and had he done so, by the time of the filing of this suit, would have been promoted to the position of a full-fledged elevator mechanic, earning $2.50 per hour, even though he was a mechanic's helper at the time he forsook it in answer to defendant's beckon.) He further sold his furniture at a financial loss of from $1,600 to $1,700 and moved his family to an unfamiliar environment three thousand miles away. Plaintiff is neither young nor irresponsible. He is aware of and does his best to fulfill his responsibility to support his family. Hence, we cannot believe he was indulging a whim or satisfying a latent wanderlust by traveling across most of the continent with his family in tow on the basis of an indefinite, uncertain, and nebulous promise of employment.

The following cases are cited in support of plaintiff's position:

Section 1654 of the Civil Code of California;
Payne v. Neuval, 155 Cal. 46, 50;
Weil v. California Bank, 219 Cal. 538, 541;
Ezmirlian v. Otto, 139 Cal. App. 486, 493;
Newby v. Anderson, 217 Pac. (2d) 69; 97 A.C.A. 83 (April 20, 1950);
Nuland v. Pruyn, 216 Pac. (2d) 526; 96 A.C.A. 936 (April 6, 1950);
Pike v. Hayden, 218 Pac. (2d) 578; 97 A.C.A. 669 (May 17, 1950);
Stockton Dry Goods Co. v. Girsh, 221 Pac. (2d) 186; 99 A.C.A. 14 (August 11, 1950);
Arrow Flying Service v. Universal Flyers Ground School, 221 Pac. (2d) 231; 99 A.C.A. 66 (August 18, 1950).

In each of the foregoing cases, including Section 1654 of the Civil Code, the contract is construed most strongly against the drafter. The contract is construed most strongly against the person who could have made it more definite and explicit. In *Stockton Dry Goods v. Girsh, supra,* the Court went further and held that a contract must be construed in such a manner as to make it work.

Who could have made this contract more definite? Are we to believe at this time that defendant's agent Stitt, fortified with his experience in personnel relations, had deliberately permitted an uncertain condition to exist which would provide him a loophole through which he could escape his legal responsibility?

Plaintiff's words and deeds throughout this series of events were said and done in absolute good faith.

We contend that there was no uncertainty.

If by any stretch of the imagination uncertainty can be adduced, the defendant is responsible and was in a position to have remedied it. The situation would be such where the law would hold that the drafter, who could have made the contract more definite, is responsible.

II. AS TO WHETHER THE LIABILITY OF DEFENDANT WAS DISCHARGED BY PLAINTIFF'S REJECTION OF AN OFFER OF PERFORMANCE.

To give credence to defendant's argument, it is necessary that we discount the findings of the District Court, which are:

> "6. That it is true that when the employment for which plaintiff was contracted became available, defendant corporation refused, and does now refuse, to fulfill the terms of the said contract, and refused, and does now refuse, to employ the plaintiff.
>
> 7. That it is true that plaintiff has performed all of the things and matters on his part to be performed under the terms of the said contract and that defendant corporation has wholly failed to perform the things and matters on its part to be performed under the said contract of employment.
>
> * * *" (33).

On August 28, 1949, Lindley told the plaintiff that he was "through", and when plaintiff, in compliance

with orders, reported to the San Joaquin Division on August 31, 1950 he was offered a job as a broke baler at the paper mill (plaintiff's qualifications were for pulp mill work) at $.115 per hour less than he had been paid for his temporary work.

It is plaintiff's contention that Mr. Stitt must have realized the company's legal responsibility to the plaintiff and had sought to rectify the damage caused by the arbitrary action on the part of Mr. Lindley, at the same time making a feeble effort at what might be construed as fulfillment of contract on the defendant's part. The tactic used was to place the plaintiff in the position where he would, by a simple arithmetical process, refuse the offered job and hence be the one to breach the contract.

Defendant's conduct is analogous to that of a hit and run driver. As this Court knows, flight on the part of a criminal suspect is evidence for the consideration of the Court or the jury as an admission of guilt, placing suspicion that he has committed the offense on the one who flees. Defendant's awareness that it had committed a wrong and violated a promise, a clear admission that there was a pre-existing contract, and its attempt to divest itself of its legal responsibility is evidenced by the aforementioned offer to plaintiff of a low-paying menial job, which defendant well knew was not commensurate with plaintiff's qualifications.

III. AS TO WHETHER THE ALLEGED CONTRACT WAS UNENFORCEABLE FOR LACK OF MUTUALITY.

The evidence showed the contract of employment was permanent and the Court so found. It is not for plaintiff to determine the legal effect of a contract; that is for the Court to determine. If defendant wishes to be bound by plaintiff's opinion, then it should be consistent, confess a judgment on the pleadings, and pay to plaintiff the full amount of the damages in accordance with the complaint.

Both parties could have breached this contract, and if either one did, he should be ready to respond in damages.

It is fallacious to argue that defendant could not have sued plaintiff for a breach of contract while he still resided in Alabama. At that time the contract was a unilateral one. When plaintiff accepted the job offer, came to California, and accepted the benefits of the temporary employment, the contract became bilateral and binding on both parties. The leading case concerning bilaterality in California is *Los Angeles Traction Co. v. Wilshire* (1902), 135 Cal. 654, 658.

Assume that after the conversation of October 18, 1948, the letter by Mr. Lindley of October 19, 1948 had enclosed a check for plaintiff's transportation, and plaintiff had cashed the check but refused to perform, would he not have been guilty of a breach of contract had defendants sued for nonperformance?

The case of *Pike v. Hayden, supra,* decided May 17, 1950, concerns the mutuality of a landlord-tenant

relationship where the lessees were let into possession and the lessors accepted the rents without objection over a period of months, and the Court holds that if there were any lack of mutuality of remedy, such lack was brought about by the lessors.

The same yardstick applies to the case at bar: performance on the plaintiff's part, acceptance of performance by defendant, and its subsequent breach.

In *Arrow Flying Service v. Universal Flyers Ground School, supra,* decided August 18, 1950, the lower Court in its interpretation of a pleaded contract sustained the demurrer because it felt that on its face, the contract showed a lack of mutuality. The Court of Appeals reversed that ruling and held that a contract is to be interpreted to give effect to the mutual intention of the parties at the time it was made, citing *Brawley v. Crosby Research Foundation, Inc.,* 73 Cal. App. (2d) 392, 397.

> "Lack of mutuality is tantamount to want of consideration, and where, as in this case, sufficient consideration is otherwise present, mutuality is not essential. It becomes essential only when its absence would leave a party without a valid or available consideration for his promise."

The consideration given by plaintiff has been repeated many times. Further repetition is unnecessary.

IV. THE ALLEGED CONTRACT WAS ENFORCEABLE AND WAS NOT TERMINABLE AT THE WILL OF EITHER PARTY.

Relying on defendant's promise that he would be given a permanent position in its pulp mill which was to open in the near future, plaintiff quit a job paying $1.58 per hour, sold his furniture at a loss of $1,600.00 and removed his family from Tuscaloosa, Alabama, to Antioch, California.

In *Seifert v. Arnold Bros., Inc.,* 138 Cal. App. 324, the plaintiff entered into a conditional sales contract to buy an automobile from defendant. In consideration for said purchase, defendant agreed to give plaintiff employment as evidenced by a letter, as follows:

> "* * * In consideration of your purchasing an Essex coupe, we are offering you employment at the rate of $80 per month. This employment is to be steady as long as your services are satisfactory." (P. 325.)

After three months, plaintiff, along with other employees, was discharged because of bad business conditions. (This was during the last depression.) The trial Court found that plaintiff had performed his work properly and he had not been employed for a reasonable period, and entered judgment in plaintiff's favor. The Appellate Court affirmed the judgment and held as follows:

> "The employment was in consideration of the purchase of an automobile from appellants and [that] the rule is clear that the employment could only be terminated under conditions which render it reasonably just and proper to do so." (P. 326.)

In *Millsap v. Natl. Funding Corp. of Calif.*, 57 Cal. App. (2d) 772, the plaintiff gave up a job paying $90 per month and went to work for the defendant for a reasonable length of time, at a beginning wage of $100 per month, to be increased at the end of two months to $110. The trial Court found that plaintiff had been discharged without cause and found two years to be a reasonable period of employment. The damages were calculated on this basis. The plaintiff testified at the trial that she would not have quit her job had defendant not offered her a permanent job. The appeal Court's holding, at page 776, was as follows:

> "In view of the recognized definition of consideration, codified in section 1605 Civil Code, which makes any prejudice suffered or agreed to be suffered by the promisee as an inducement to the promisor, which the promisee is not legally bound to suffer, good consideration for a promise, it is hard to follow the reasoning of those cases from other jurisdictions which hold that the giving up of other employment cannot afford sufficient consideration for a promise of permanent employment. Where the prospective employee clearly states to his prospective employer, as in the case before us, that he will not give up his present employment unless the prospective employer will agree to give him permanent employment and the prospective employer expressly agrees to those terms, it seems clear that the prospective employee (to paraphrase the language of section 1605 of Civil Code) in giving up his present employment suffers a prejudice as an inducement to the promisor for his promise of permanent employment. 'It is not necessary

> to the existence of a good consideration that a benefit should be conferred upon the promisor. It is enough that a "prejudice be suffered or agreed to be suffered" by the promisee.' (6 Cal. Jur. 171.) We therefore hold that there was sufficient consideration for the promise of permanent employment (construed by the court in this case as employment for a reasonable period) in accord with the rule laid down in the following cases: * * *"

The case of *Thacker v. American Foundry*, 78 Cal. App. (2d) 76, cited by appellants in its brief, is not in point, for the Court, at page 84 said as follows:

> "* * * In the first place, neither the pleadings nor the findings make mention of a failure to continue plaintiff's employment for a reasonable time, nor that the term of approximately one year and three months during which plaintiff was so employed was not for a reasonable time. * * *"

An examination of the facts of the case at bar reveals that the employer (defendant) was in dire need of experienced and qualified workmen for its new pulp mill plant that was about to open. These workmen were needed so badly that defendant placed an advertisement in a paper trade journal, giving its reply address as "Box 24, Southern Pulp & Paper Manufacturing; 75 Third Street, N. W.; Atlanta, Georgia." (39 P-1, 190-193.)

Defendant's eagerness is best evidenced by the fact that plaintiff's letter, dated August 26, 1948, was answered by Stitt immediately (letter dated Septem-

ber 1, 1948) (41 P-2). Why no less a personage than the plant manager himself should devote personal attention to the routine matter of answering an application is brought out by Mr. Stitt's testimony to the effect that the defendant corporation at that time desperately needed three hundred qualified workmen. Hence, the plaintiff was the answer to defendant's prayer and an extremely desirable prospective employee.

We therefore have every right to assume that when Lindley entered upon his job on October 1, 1948, he was briefed by Stitt personally about the plaintiff since Stitt had handled the original correspondence. Lindley's reaction to Townsend's (the plaintiff's) telephone call is the best indication of the above assumption. By Lindley's own testimony, we know that he went to the personnel office and dictated the letter to be sent to plaintiff (45-46 P-3) not trusting his personnel manager, Gordon McCuish, to take care of the matter. *Why?* Because plaintiff was too valuable a man to let slip through defendant's fingers at the time, and it is our contention that the plaintiff was a "fair-haired boy" until defendant realized he was "too good a union man".

The above discussion is necessary in order to determine what actually transpired since the testimony of defendant's employees does not coincide with the plaintiff's at crucial points. This District Court has a right and a duty to reach a conclusion from all the evidence as to what really happened in view of all the surrounding facts and circumstances.

In evaluating the circumstances, the District Court must have taken into account the plaintiff's economic insecurity as against the defendant corporation's wealth and economic strength. This was not for the purpose of "soaking the rich and giving it to the poor" but for the sole purpose of examining the motive behind defendant's acts. Reasonable men can reasonably conclude that the employer (the defendant) considered the plaintiff an excellent "catch" when the plant manager sent plaintiff (a prospective employee) a personal letter and then followed up a telephone conversation with a letter to "cinch the deal" (45-46 P-3).

It is illogical to assume that a workman would quit a job paying $250 or more a month in his own environment, sell his furniture at a loss, uproot his entire family, leave his home like a "pack rat" and travel over half the continent unless he had actually and definitely been assured of permanent life employment with a new growing industry.

Certainly it would have been wiser had plaintiff employed an attorney and protected himself in every detail before "pulling up stakes", but the Court cannot and should not penalize this plaintiff for having had faith and confidence in the words, deeds, writings, and essential integrity of the defendant corporation's agents, servants, and representatives, and for having believed that permanent lifetime employment in a field in which he was experienced was his, and which in addition offered him an opportunity to own his own home.

V. THE STATUTE OF FRAUDS IS NOT APPLICABLE.

Our contention is that the written evidence is sufficient to constitute a contract, and we have already referred to the extent of parol evidence that is permitted in the event of ambiguity or uncertainty.

Since defendant raises the question of the Statute of Frauds, we will examine that for its applicability to the case at bar. We might point out at the outset that said statute does not apply under more than one consistent theory, and for this limited purpose assume that there was no writing at all.

First theory.

An oral contract capable of being performed within a year is not within the statute, though by its terms it is not to be performed within a year. (See *Columbia Pictures Corp. v. DeToth,* 87 Cal. App. (2d) 620, 631-635. Also 49 *Am. Jur.,* 387, sec. 25, and page 391, secs. 29 and 30.)

The Court is familiar with the legion of cases, especially employment cases, which have ruled that the terms "for life", "forever", or, as in the instant case, "permanent", are construed to mean that the contracts could be performed within a year, even though the relationship exists over a period of years. Death could and can intervene at any time is the theory followed. (See Sections 51 and 58 of 49 *Am. Jur.*, 409, which clearly spells this out.)

Second theory.

The Court is familiar with the estoppel doctrine where the application of the statute would result in a

fraud and would inhere in the resultant unconscionable injury from denying enforcement of a contract after one party has been induced to change his position seriously by the other party in reliance on the contract, or where fraud inheres in the unjust enrichment of a party who has received the benefits of another's performance, were he allowed to rely on the statute.

The Court is familiar with *Seymour v. Oelrichs,* 156 Cal. 782 and the subsequent cases. Many Courts have mistakenly limited the application of the doctrine of the *Seymour* cases to only those cases where the promisor promised a contract in writing, but the recent decision in *Monarco v. LoGreco,* 220 Pac. (2d) 737; 35 A.C. 669 (August 1, 1950) wherein, after a scholarly discussion of the law, Justice Traynor holds that a promise to make a written contract is not necessary when the unconscionable injury is present.

Third theory.

The law applicable to a written memorandum against the party to be charged is clearly applicable here. A discussion thereof is unnecessary.

Fourth theory.

Part performance by the party seeking to enforce the agreement removes the parol agreement from the category of actions covered by the Statute of Frauds (49 *Am. Jur.* 427, 436, 471).

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the judgment of the District Court should be affirmed.

Dated, San Francisco, California,
February 29, 1942.

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